

ORIGINAL



0000050815

BEFORE THE ARIZONA CORPORATE COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER – Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

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AZ CORP COMMISSION
DOCUMENT CONTROL

ARIZONA WATER COMPANY, an Arizona)	DOCKET NO. W-01445A-06-0200
corporation,)	SW-20445A-06-0200
Complainant,)	W-20446A-06-0200
)	W-03576A-06-0200
vs.)	SW-03575A-06-0200
)	
GLOBAL WATER RESOURCES, LLC, a foreign)	
limited liability company; GLOBAL WATER)	
RESOURCES, INC., a Delaware corporation;)	
GLOBAL WATER MANAGEMENT, LLC, a)	
foreign limited liability company; SANTA CRUZ)	
WATER COMPANY, LLC, an Arizona limited)	
liability company; PALO VERDE UTILITIES)	
COMPANY, LLC, an Arizona limited liability)	
company; GLOBAL WATER – SANTA CRUZ)	
WATER COMPANY, an Arizona corporation;)	
GLOBAL WATER – PALO VERDE UTILITIES)	
COMPANY, an Arizona corporation; JOHN AND)	
JANE DOES 1-20; ABC ENTITIES I – XX,)	
)	
Respondents.)	

**GLOBAL'S REPLY
IN SUPPORT OF ITS
MOTION TO DISMISS**

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1 Respondents (collectively, "Global") provide this Reply in Support of their Motion to
2 Dismiss.

3 **I. PRELIMINARY STATEMENT.**

4 Throughout its Response to Global's Motion to Dismiss, Arizona Water Company
5 ("AWC") suggests that AWC's Complaint should not be dismissed because evidence might turn
6 up in discovery, or because various accusations might be proven. Tellingly, AWC does not point
7 to actual allegations in its Complaint to support its position. This is fatal to AWC's cause.
8 AWC's Complaint must be judged based on the factual allegations contained in the Complaint.
9 The purpose of a motion to dismiss to determine whether, if the complainant's factual allegations
10 were true, the Complaint would state a valid legal claim. Because the factual allegations in
11 AWC's Complaint do not support its legal claims, AWC's Complaint should be dismissed. This
12 is true for each of the three counts in AWC's Complaint.

13 **First,** AWC has not alleged facts sufficient to support its claim that the Unregulated Global
14 Companies are the alter egos of public service corporations, or are themselves public service
15 corporations. AWC did not allege any facts that would support an alter ego finding, such as
16 undercapitalization or disregarding corporate formalities. Nor did AWC allege that the
17 Unregulated Global Companies actually provide water or wastewater service to the public, and
18 they therefore do not meet the definition of public service corporations in the Arizona
19 Constitution.

20 **Second,** AWC has not alleged facts sufficient to support its legal claims against Global's
21 Infrastructure Coordination and Financing Agreements (ICFA) and Public Private Partnerships
22 (P3). The ICFA serves Commission goals such as consolidation and reducing reliance on
23 advances, while still complying with the Commission's main extension rule. Moreover, the
24 Commission has already established a more appropriate docket to review the ICFAs. The
25 Commission should not consider AWC's attack on the P3s out of comity for the Cities. Further,
26 the attacks on both the ICFAs and P3s relate to rates, but do not satisfy the statutory requirements
27 for rate-related complaints.

1 **Third**, AWC seeks an injunction against speech that would violate the Arizona and United
2 States Constitutions. Global's speech is lawful, and even if it was not, AWC's proposed remedy is
3 disproportionate.

4 **II. LEGAL STANDARDS.**

5 **A. Global appropriately referred to additional facts.**

6 In reviewing a motion to dismiss, the tribunal will treat factual allegations as true, but will
7 "not accept as true allegations consisting of conclusions of law, inferences or deductions that are
8 not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions
9 for such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256,
10 1259 (Az. App. 2005). In addition, AWC attached copies of an ICFA and P3 to its Complaint, and
11 these documents can be examined directly to see if they support AWC's claims. *See Young v.*
12 *Bishop*, 88 Ariz. 140, 144, 353 P.2d 1017, 1019 (1960).

13 AWC objects that Global is "putting the cart before the horse" by raising various factual
14 matters in its Motion to Dismiss. (AWC Response at 4:11-12). While AWC is correct that factual
15 allegations in the complaint are presumed true at the motion to dismiss stage, it fails to note that
16 these are not the only facts that can be considered. It is well-established that the tribunal "is not
17 limited to the four corners of the complaint" in reviewing a motion to dismiss, but rather may
18 consider "matters incorporated by reference or integral to the claim, items subject to judicial
19 notice, matters of public record, orders, [and] items appearing in the record of the case." *Wright &*
20 *Miller, Federal Practice and Procedure*, Civ.3d § 1357; *see e.g. The Delaware Nation v.*
21 *Commonwealth of Pennsylvania*, ____ F.3d ____, 2006 WL 1171859 n. 2; (3rd Cir. May 4,
22 2006)(public records and undisputedly authentic documents); *Gemtel Corp. v. Community*
23 *Redevelopment Agency of the City of Los Angeles*, 23 F.3d 1542, 1544 n. 1 (9th Cir. 1994)(matters
24 of public record).

25 Thus it was perfectly appropriate for Global to refer to various matters subject to official
26 notice or which were of public record, such as AWC's contentious litigation history in Pinal
27 County or the prevalence of water utility holding companies as disclosed in Commission records.

1 In one case, Global did refer to matters outside this rule, specifically, its actual corporate structure.
2 But in doing so, it was careful to note that the additional information was provided for
3 informational purposes only, and specifically noted that for the purposes of the motion to dismiss,
4 the Commission had to "accept [AWC's] factual allegations as true, even though they are
5 demonstrably wrong." (Global Motion at 5 n. 4). Thus, Global acted appropriately in referring to
6 certain additional facts.¹

7 AWC argues that a "motion to dismiss is inappropriate at this early stage of the
8 proceedings." (AWC Response at 4:15). But, under the Commission's own rule, this is the only
9 stage when such a motion can be filed, because a motion to dismiss must be filed with the Answer.
10 See A.A.C. R14-3-106(H); *see also* Ariz.R.Civ.Pro. 12(b)(motion to dismiss cannot be filed after
11 answer).

12 **B. Global does not evade Commission oversight by suggesting that an invalid**
13 **complaint be dismissed.**

14 AWC main theme is to suggest that Global would somehow escape Commission oversight
15 if AWC's three claims were dismissed. But the Commission appropriately exercises its oversight
16 power when it dismisses claims that are without merit. AWC variously suggests that more
17 discovery and investigations are needed. But these suggestions do not excuse AWC from the
18 obligation of alleging facts in its Complaint that support its legal claims. As shown below, it has
19 not done so. A tribunal has "no obligation to conjure up unpleaded allegations" if they are not
20 raised in the complaint. Wright & Miller, *Federal Practice and Procedure*, Civ.3d § 1357. If the
21 Commission finds that the factual allegations in AWC's Complaint do not support its legal claims,
22 the Commission should dismiss AWC's Complaint. This would in no way limit the
23

24
25 ¹ Even if the any of additional facts cannot be considered as part of a motion to dismiss, Global did not act
26 inappropriately, as AWC alleges. If factual matters outside of the rule stated above are presented in a motion to
27 dismiss, this simply converts the motion to dismiss into a motion for summary judgment. Ariz.R.Civ.Pro. 12(b). The
conversion of such motions is a routine and unremarkable occurrence. On the other hand, considering the types of
facts noted above does not convert a motion to dismiss into a motion for summary judgment. Wright & Miller,
Federal Practice and Procedure, Civ.3d § 1357.

Commission's own authority to investigate matters of interest to it, as it currently is doing in the generic water financing docket, Docket No. W-00000C-06-0149.

III. THE UNREGULATED GLOBAL COMPANIES ARE NOT PUBLIC SERVICE CORPORATIONS.

In Count 1 of its Complaint, AWC asks the Commission to assert jurisdiction over the Global entities ("Unregulated Global Companies") that do not hold Certificates of Convenience and Necessity ("CC&Ns") from the Commission. Count 1 raises two separate legal claims: (1) that the Unregulated Global Companies are "alter egos" of the regulated subsidiaries, and (2) that they should be treated as public service corporations in their own right.

First, AWC alleges that the Unregulated Global Companies are "alter egos" of the regulated subsidiaries. (AWC Complaint ¶ 49). Normally, companies are treated as separate legal entities from their owners and affiliates. But under very limited circumstances, a court can disregard this principle and find the company to be an alter ego. As noted in our Motion to Dismiss, AWC has not alleged the existence of any of the traditional factors (such as undercapitalization or disregard of corporate formalities) which can be used to support an alter ego finding. Accordingly, AWC's alter ego claim must fail.

Second, AWC argues that the Unregulated Global Companies can be directly treated as public service corporations in their own right. (AWC Complaint ¶ 46). In its Response, AWC points to the "fact intensive" eight-factor *Serv-Yu* test, and suggests that because this analysis is so fact-based, granting a motion to dismiss is not proper. But the *Serv-Yu* test simply is not relevant, because it only applies once the textual definition of "public service corporation" is met.

In order for the Commission to have jurisdiction over a company, the company must fall within the definition of "public service corporation" set forth in Article XV § 2 of the Arizona Constitution. *Southwest Gas Corp. v. Arizona Corp. Comm'n*, 169 Ariz. 279, 285-86, 818 P.2d 714, 721-22 (App. 1991). That alone is not enough, however, and a company that meets the definition must also satisfy the additional standards described in cases such as *Serv-Yu*. *Id.* Thus, the textual definition acts as a threshold test that must be passed before additional factors can be

1 considered. Counsel for the Commission recently reiterated this point to the Court of Appeals,
2 noting that there are two steps to determining whether a company is a public service corporation:
3 (1) a threshold determination of "satisfying the textual definition"; and (2) a separate consideration
4 of "the various additional factors presented by *Serv-Yu* and other related cases." *See Arizona*
5 *Corporation Commission's Responsive Brief* at 27-28, filed October 24, 2005 in *Southwest*
6 *Transmission Cooperative v. Arizona Corporation Commission*, No. 1 CA-CV 05-0369.

7 AWC has not alleged that the Unregulated Global Companies actually provide water or
8 wastewater service to the public. The Unregulated Global Companies therefore do not meet the
9 textual definition of public service corporation in the Arizona Constitution. Thus, they are not
10 subject to Commission jurisdiction. Because this threshold test is not satisfied, there is no need to
11 consider the *Serv-Yu* factors.

12 AWC argues that the Commission must undertake a three-step process in evaluating
13 whether a company is a public service corporation: (1) taking evidence; (2) finding facts; and (3)
14 applying those facts to the law. (AWC Response at 26:22-26). AWC cites *Southwest Gas* for this
15 proposition. But in *Southwest Gas*, as in this case, there were no disputed facts and the
16 Commission can immediately jump to step three. *See Southwest Gas*, 169 Ariz. at 284, 818 P.3d
17 at 719. As noted above, AWC has not alleged that the Unregulated Global Companies provide
18 water or wastewater service. There is no factual dispute on this point. By applying this
19 undisputed fact to the definition of public service corporation in the Arizona Constitution, the
20 Commission can dispose of AWC's claim.

21 In sum, AWC has not alleged facts to support an alter ego finding, nor has it alleged facts
22 to support a finding that the Unregulated Global Companies meet the definition of public service
23 corporation in Article XV § 2 of the Arizona Constitution. Accordingly, Count 1 of AWC's
24 Complaint should be dismissed. Further, because the Unregulated Global Companies are not
25 subject to the Commission's jurisdiction, they are not proper respondents in this case, and they
26 should be dismissed as parties to this matter.

1 **IV. THE ICFAs AND P3s DO NOT INVOLVE ILLEGAL RATES.**

2 **A. The ICFAs are a financing tool that promotes Commission goals and follows**
3 **Commission rules.**

4 The ICFAs, by their express terms, carefully separate the roles of the regulated subsidiaries
5 from the role of Global Water Resources, LLC. This separation is evident in the ICFA attached to
6 AWC's Complaint, as explained in Global's Motion to Dismiss. Since the terms of the ICFA do
7 not support its claims, AWC is reduced to vaguely claiming that its claims will be supported "once
8 the facts become known" about the "actual operation" of the ICFAs. (AWC Response at 9:11-12).
9 AWC does not tell us what these "facts" might be, and they are certainly not listed in AWC's
10 Complaint. Because these supposed "facts" are not alleged in AWC's Complaint, they cannot be
11 used to support its claim.

12 AWC asserts that the ICFAs are not really voluntary, claiming that "more factual discovery
13 is necessary to fully develop how this scheme works." (AWC Response at 11:16). Once again,
14 AWC is obligated to allege sufficient facts in its Complaint to support its claims. AWC's
15 Complaint does not allege that the ICFAs are not voluntary. In its Response, AWC also claims
16 that the regulated subsidiaries will not allow an area into their CC&Ns unless an ICFA is signed.
17 However, it is the Commission, not Global or AWC that controls what areas are within a CC&N.
18 Landowners within the CC&Ns of Global's regulated subsidiaries are free to request a main
19 extension agreement without an ICFA. The regulated subsidiaries have no obligation to serve
20 landowners or developers outside of their CC&N areas. However, such landowners and
21 developers are free to negotiate with *any* provider to reach mutually agreeable terms, which may or
22 may not include an ICFA. AWC makes much of the fact that it has extensive operations in Pinal
23 County. Developers are free to choose AWC. Yet many developers voluntarily choose to sign
24 ICFAs with Global.

25 AWC next claims that the ICFAs are really Main Extension Agreements in disguise, and
26 that the ICFAs represent an attempt to evade the Commission's main extension rule, A.A.C. R14-
27 2-406. AWC fails to note that the ICFA expressly contemplates that the developer must enter in to

1 a separate main extension agreement with the regulated subsidiaries. (AWC Complaint, Ex. 1 at
2 Ex. E and F). Thus, regardless of whether an ICFA is in effect, a developer must sign a main
3 extension agreement, which will be subject to Staff review under A.A.C. R14-2-406(M). The
4 Commission's main extension rule is in no way "evaded" as claimed by AWC.

5 AWC also claims that the ICFAs help Global "develop a war chest" to purchase other
6 companies. (AWC Response at 13:12). This hyperbole ignores the fact that no company is forced
7 or required to sell to another. Further, it simply makes sense to have developers help fund such
8 voluntary consolidation – an objective favored by the Commission. Arizona has hundreds of water
9 companies, many of them small. Such small companies are often poorly capitalized, lack
10 economies of scale, and lack operational and managerial sophistication. Thus, Commission policy
11 supports the consolidation of small water companies. *See Montezuma Estates Water Co.*, Decision
12 No. 67583 (Feb. 15, 2005) at Finding of Fact No. 35. The ICFAs represent an innovative new tool
13 to accomplish this purpose. This is important because the Commission has generally not allowed
14 acquisition adjustments for purchases, and in the absence of such an adjustment, acquisitions are
15 often difficult to justify economically. Moreover, ICFAs represent a superior tool to acquisition
16 adjustments, because acquisition adjustments cause customers to pay higher rates, but developers
17 pay for the ICFA fees used to support an acquisition.

18 Surprisingly, AWC defends the all-too-common practice of water companies loading up on
19 Contributions in Aid of Construction (CIAC) and Advances in Aid of Construction (AIAC),
20 leaving the companies with little or no rate base. The dangers of this practice are evident from
21 numerous cases before the Commission in recent years. As Staff recently noted, "[o]ver-reliance
22 on AIAC can produce [a] risky... capital structure and result in a utility with little or no investment
23 upon which to earn a return and sustain its growth and viability." *See Memorandum from James J.*
24 *Dorf, Chief Accountant, dated February 9, 2006, at 2, attached as Exhibit 3 to Staff Report dated*
25 *February 10, 2005 in Docket No. SW-01428A-05-0022.*²

26
27 ² Likewise, Staff recently stated that "Staff usually recommends that the total AIAC and CIAC not exceed 25-
30 percent of related estimated capital expenditures. Over-reliance on AIAC and CIAC can lead to improperly

1 This Commission has expressed similar views. For example, in *Mountain Pass Utility Co.*,
2 Decision No. 65133 (Aug. 16, 2002), the Commission rejected RUCO's argument that the water
3 distribution and wastewater collection systems for certain major developments should be funded
4 entirely by AIAC. The Commission found that: "[W]e do not agree that AIACs are a 'cost free
5 source of capital' merely because their costs are not included in rate base." *Id.* at 7. The
6 Commission noted that A.A.C. R14-2-406.D requires a portion of AIAC to be refunded. The
7 Commission then observed that "[r]evenues refunded or deferred have the same effect as a cost to
8 the entity and increase the likelihood of financial instability thus necessitating the more frequent
9 filing of rate cases." *Id.* The Commission thus approved the use of 100% equity to finance the
10 facilities in question. *Id.* at 8.

11 AWC implies that concerns about excessive CIAC and AIAC should not be considered
12 because higher rates may result. It seems better, though, to set rates at an adequate level from the
13 onset, rather than driving the utility to the point of crisis and then imposing an unexpected increase
14 on customers. Moreover, it is not clear that the ICFAs will result in higher rates, because they
15 allow for regional planning to achieve economies of scale. It makes no economic sense to build
16 systems parcel by parcel. ICFAs allow Global to avoid this. The reduced cost of service is passed
17 on to customers in the ratemaking process. AWC's claim that the ICFAs promote building
18 unneeded facilities is contradicted by the payment structure of the ICFAs, which ensures that
19 facilities are not built until development is ready to occur.

20 Moreover, this case is a poor vehicle to resolve any dispute over the rate impacts, if any, of
21 the ICFAs. Staff and RUCO are not parties to this case. But they are both expected to participate
22 in the Commission's generic water financing docket, Docket No. W-00000C-06-0149. That
23 docket was created for the express purpose of reviewing non-traditional financing such as the
24 ICFA. The generic docket was established prior to this case. Further, it will involve Staff and
25

26
27 capitalized private water and wastewater companies." Memorandum from Jamie R. Moe, Public Utilities Analyst V,
dated May 19, 2006 at 2; attached as Exhibit 3 to the Staff Report dated May 26, 2006 in Docket No. SW-02422A-05-
0659.

1 RUCO acting in accordance with their mission to protect the public interest. In contrast, this case
2 involves solely the private interests of AWC's shareholders. AWC's claimed "urgent need for the
3 Commission to investigate" (AWC Response at 14:8) the ICFAs is odd given that the Commission
4 already established an investigation before AWC filed its Complaint. Staff states that a final
5 Commission decision in the generic docket is expected in the 3rd quarter of 2006.³ The generic
6 docket should be allowed to run its course.

7 AWC's emphasis on cost of service makes its later claim that this case is not rate -related
8 somewhat incongruous. AWC is forced to make this claim because it has not complied with the
9 statutory requirements for filing a rate-related complaint. *See* A.R.S. § 40-246(A). AWC implies
10 that the requirements of A.R.S. § 40-246(A) are limited to "a traditional rate case". (AWC
11 Response at 16:22). However, a proceeding can relate to rate-making even if it is not a traditional
12 rate case. *See Arizona-American Water Co. v. Arizona Corp. Comm'n*, 209 Ariz. 189, 191-92 ¶¶
13 12-13, 98 P.3d 624, 626-27 (App. 2004). Indeed, the court distinguished between a rate case
14 under commission rules (A.A.C. R14-2-103) and statutory proceedings related to rates. *Id.* There
15 is therefore no reason to read the statutory language of "reasonableness of any rates or charges" in
16 Section 40-246(A) as limited to only traditional rate cases. As AWC acknowledges, its claim goes
17 to "the legality of the fees and charges themselves." (AWC Response at 16:23). Any rates and
18 charges which were illegal would of necessity be unreasonable, so AWC's claim clearly falls
19 within A.R.S. § 40-246(A).

20 In sum, AWC's requests for more discovery or investigations do not excuse it from having
21 to allege facts in its Complaint sufficient to support its legal claims. Moreover, the Commission
22 already has a proceeding in place to investigate the ICFAs and other financing matters. In
23 addition, the ICFAs serve important Commission goals such as promoting consolidation and
24 reducing excessive reliance on AIAC and CIAC. And finally, AWC's Complaint does not meet
25

26
27 ³ Memorandum of Jamie R. Moe, Public Utilities Analyst V, dated May 19, 2006 at 3; attached as Exhibit 3 to
the Staff Report dated May 26, 2006 in Docket No. SW-20422A-05-0659.

1 the requirements of A.R.S. § 40-246(A) regarding rate related complaints. Accordingly, the
2 portions of AWC's Complaint concerning ICFA's should be dismissed.

3 **B. The Commission should not second-guess the decisions of the Cities to sign the**
4 **P3s.**

5 AWC accuses the City of Casa Grande (and by extension, the City of Maricopa) of
6 accepting "payoffs" and "kickbacks" in order to disregard the public interest. (AWC Response at
7 15: 13-14) As explained in our Motion to Dismiss, the P3s are carefully designed to preserve the
8 Commission's authority over the issuance of CC&Ns and approval of rates. Further, out of comity
9 and respect for the Cities, the Commission should not entertain this attack on the integrity of the
10 Cities. The Arizona Supreme Court recently emphasized the importance of comity in declining
11 to rule upon the adequacy of the Federal Government's legal representation of certain Native
12 American tribes in the 1930s. *See In re the General Adjudication of All Rights to Use Water in the*
13 *Gila River System and Source*, 473 Ariz. Adv. Rep. 19 ¶¶ 64-67, 127 P.3d 882, 899 (Ariz. 2006)
14 *reconsideration denied* ____ Ariz. ____, ____ P.3d ____, 2006 WL 1158784 (Ariz. May 3,
15 2006). Likewise, the Commission should not entertain an attack that directly implicates decisions
16 made by the Cities, especially one that also implicates their honor and integrity.

17 Moreover, AWC emphasizes that its attack is related to a fee. (AWC Response at 15). For
18 the reasons explained above, this is fatal, because AWC did not comply with A.R.S. § 40-246(A).

19 AWC's claim that Global has "never visited and [has] no track record whatsoever in
20 serving" Pinal County is simply unsupportable. (AWC Response at 16:3-4). Global is proud of its
21 track record in Pinal County where its regulated subsidiaries have CC&Ns and are serving
22 thousand of customers. Global also rescued the "387 Districts" from potential collapse. *See Palo*
23 *Verde Utilities Co.*, Decision No. 68498 (Feb. 23, 2006) at 10-11. Global is likewise proud of its
24 close and co-operative relationship with Pinal County and the Cities of Maricopa and Casa
25 Grande.

26 AWC's attack on the P3s should be dismissed for many reasons. It is an attack on the
27 Cities, which the Commission should not consider out of comity. It does not meet the

1 requirements of A.R.S. § 40-246(A) for rate-related complaints. And more fundamentally, it is in
2 the public interest for a utility to have good relationships with local governments.

3 **V. THE COMMISSION SHOULD NOT RESTRICT GLOBAL'S SPEECH.**

4 Count Three of AWC's Complaint seeks an injunction against Global soliciting both
5 within AWC's CC&N area, and in a vast but undefined area of Pinal County outside of AWC's
6 CC&N. (AWC Complaint at ¶¶ 61-62). As shown in our Motion to Dismiss, such a sweeping
7 restriction on free speech would violate both the Arizona and United States Constitutions. AWC
8 has not alleged facts justifying this unprecedented request for a prior restraint of Global's
9 constitutional rights.

10 AWC responds by suggesting that its proposed injunction impacts conduct, not speech.
11 But AWC seeks to restrict "soliciting", and soliciting is defined as "a request or petition" or "to
12 seek to obtain by persuasion, entreaty, or formal application." *Black's Law Dictionary* (7th ed.
13 1999); *The American Heritage Dictionary* (2nd College Ed. 1982). Thus, soliciting clearly
14 involves speech.

15 Next, AWC argues that it only seeks to prohibit deceptive or illegal speech. Yet AWC
16 does not allege in its Complaint how Global's speech is deceptive. And Global has explained
17 how its speech has numerous lawful purposes. Moreover, even if AWC was correct that Global's
18 speech was in part illegal, its proposed remedy is too sweeping because it is not limited to any
19 supposed illegal activity. *See State ex rel. Corbin v. Tolleson*, 160 Ariz. 385, 392, 773 P.2d 490,
20 497 (App. 1989)(government must distinguish between lawful and unlawful components of
21 message).

22 Moreover, for the government to regulate commercial speech under the *Central Hudson*
23 test, the regulation's "scope must be in proportion to the interest served" or in other words it must
24 be a "reasonable fit." *Salib v. City of Mesa*, ____ Ariz. ____, ____ P.3d ____, 2006 WL
25 1171887 ¶ 16 (Ariz. App. May 3, 2006). In undertaking this analysis, "the existence of numerous
26 and obvious less-burdensome alternatives to the restriction on commercial speech... is certainly a
27 relevant consideration." *Id.* (citation omitted). Here, a utility cannot operate without a CC&N

1 issued by the Commission. Thus, an obvious and less burdensome alternative to AWC's proposed
2 injunction against speech is for the Commission to simply not issue a CC&N if it finds that
3 AWC's rights would be infringed upon by the operations of the Global's regulated subsidiaries in
4 an area.

5 In addition, the Arizona Constitution provides broader protections for free speech than the
6 Federal Constitution. Although the exact scope of this extra protection is not known, (*See Id.* ¶
7 24), this factor further cautions against granting AWC's proposed wide-ranging injunction against
8 Global's speech.

9 AWC also objects to Global's statement that AWC's Complaint "does not allege that
10 Global has actually attempted to serve anyone in AWC's CCN area" nor "alleged that Global has
11 requested a CCN for any of AWC's territory." (AWC Response at 19:21-25). AWC points to
12 Page 3 lines 10-23 of its Complaint. But those lines simply allege that Global solicited customers,
13 not that Global attempted to serve or requested a CC&N for those areas. AWC also points out that
14 Global attempted to intervene in a then-pending AWC CC&N case. (AWC Response at 20:1-2).
15 Global has an absolute right to petition government and in any event, AWC had no CC&N for the
16 area at the time.⁴ Moreover, this matter is not described in AWC's Complaint.

17 **VI. CONCLUSION.**

18 For the reasons stated above, Global asks that all three counts of AWC's Complaint be
19 dismissed.

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25 ⁴ AWC also points to a recorded ICFA that does impact AWC's CC&N area. The ICFA covers a number of
26 areas both inside and outside AWC's CC&N. The portion inside AWC's CC&N was included by mistake. Global
27 apologies for this error. However, this error is not alleged in AWC's Complaint and thus should not be considered.
Further, Global is willing to condition the dismissal of this claim on its recording a release with respect to the portion
of this ICFA that inadvertently included AWC's territory.

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1 RESPECTFULLY SUBMITTED this 30th day of May 2006.

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